(1)

90-1140

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER, 1990 TERM

HUBERT GARRIE
Petitioner

VERSUS

JAMES L. GRAY, INC.,
Respondent

WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JEANSONNE AND BRINEY

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I. QUESTIONS PRESENTED FOR REVIEW

A. Does 46 USCA 2114 prohibit a maritime employer from discharging a seaman in retaliation for calling the Coast Guard to request information concerning safety regulations?

B. Whether Congress intended that maritime employees be afforded the same protection from retaliatory discharge for reporting safety violations as that enjoyed by land-based workers
under OSHA.

C. Does 42 USCA 1985 prohibit a private conspiracy to interfere with an individual's federally protected right to communicate with a U.S. Government agency on a matter of public concern free of retaliation?

II. LIST OF PARTIES

(a) Hubert Garrie, Relator

(b) James L. Gray, Inc., Respondent

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V. REFERENCE TO OPINION IN CASE BELOW

The opinion delivered in the court below was reported as follows:

Hubert Garrie, Plaintiff-Appellant v. James L. Gray, Inc. and Texaco, Inc., Defendants-Appellees, No. 89-4815, United States Cour of Appeals, Fifth Circuit, 912 F.2d 808.

VI. STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked on grounds set forth in 28 USCA 1254. This is a petition for writ of certiorari to review a judgment of the United States Court of Appeal for the Fifth Circuit rendered September 25, 1990. Relator respectfully avers he filed a petition for rehearing with respect to the judgment sought to be reviewed, on October 9, 1990 and that the United States Court of Appeals for the Fifth Circuit rendered its order denying Petitioner's petition for rehearing on October 24, 1990.

VII. STATEMENT OF AUTHORITIES

This case involves the following federal statutes and regulations:

(a) 46 USCA 2114(a)

> "An owner, charterer, managing operator, agent, master or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred."

(b) 46 USCA 8104(b)

> "On an ocean-going or coastwise vessel of not more than one hundred gross tons a licensed individual may not be required to work more than nine of twenty-four hours when in port, including the date of arrival, or more than twelve of twenty-four hours at sea, except in an emergency when life or property are in danger."

(c) 29 CFR 1977.9(a) Complaints under or related to the Act.

> "(a) Discharge of, or discrimination against, an employee because the employee has filed 'any complaint *** under or related to this Act ***' is prohibited by

section 11(c). An example of a complaint made 'under' the Act would be an employee request for inspection pursuant to 8(f). However, this would not be the only type of complaint protected by 11(c). The range of complaints 'related to' the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application, which entails the full extent of the commerce power."

(d) 29 CFR 1977.15(a), (b) Filing of complaint for discrimination.

"(a) Who may file. A complaint of 11(c) discrimination may be filed by the employee himself, or by a representative authorized to do so on his behalf."

"(b) Nature of filing. No particular form of complaint is required.

(e) 29 CFR 1977.12(a) Exercise of any right afforded by the Act.

"(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, 11(c) also protects emloyees from discrimination occurring because of the exercise 'of any right afforded by this Act.' Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10), Certain other rights exist by necessary impli-

cation. For example, employees may request information from the OSHA; such requests would constitute the exercise of a right afforded by the Act."

(f) 42 USCA 1985(3)

"If two or more persons in any state or territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of person of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws; or if two or more persons conspire to prevent by force intimidation or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for the President or Vice President, or is a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged there do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his personal property, or deprived of having and exercising any right or privilege of a citizen of the United States, the parties so injured or deprived

may have an action for the recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators."

(g) U.S. Code, Cong. & Admin. News, 1984, P. 4842.

"The Committee intends the term seaman to be interpreted broadly, to include any individual engaged or employed in any capacity on board a vessel owned by a citizen of the United States. To receive relief, the seaman must act in good faith, believing that a violation of subtitle II of title 46 has occurred."

VIII. STATEMENT OF THE CASE

This is an employment discrimination action by Petitioner HUBERT GARRIE ("GARRIE"), against his former employer JAMES L. GRAY, INC. ("GRAY"). GARRIE claims GRAY and TEXACO conspired to discriminate against him because he reported safety violations to the Coast Guard, that his reporting of those violations was protected activity under 46 USCA 2114 (a) and the general maritime law; and that the combination of GRAY and TEXACO to deprive him of the equal protection of law (specifically the protection afforded him by virtue of 42 USCA 2114 (a) and the First Amendment), also violated 42 USCA 1985(3).

During May and June of 1986, GARRIE was employed by
GRAY as the master of a vessel owned by GRAY and leased to TEXACO. He was required to work more than twelve (12) hours in a twenty-four (24) hour period, on numerous occasions.

The trial court found:

> "In June of 1986 through July of 1986, Garrie did not work scheduled hours; rather, he would make a day or night run, whichever was needed. Garrie would leave for the day run at 6:00 a.m., and return around 3:00 p.m. Often after his day run, Garrie would then make night runs with another pumper to Rabbit Island, stand by overnight until approximately 5:30 and then return to Horseshoe Bayou for his regular day run to Bell Island. The log book for the Mr. Bill indicated that as a result of this schedule Garrie worked more than twelve hours per day on several occasions in June of 1986."

GARRIE's schedule violated safety regulations concerning hours of work contained in applicable federal law, specifically 46 USCA 8104(b):

> "On an ocean-going or coastwise vessel of not more than 100 gross tons, a licensed individual may not be required to work more than nine of 24 hours when in port, including the date of arrival, or more than twelve of 24 hours at sea, except in an emergency when life or property are in danger."

GARRIE reported to the Coast Guard what he believed, in good faith to be a violation of federal law concerning excessive working hours. On June 23, 1986, he informed the TEXACO pumper he would not operate his vessel more than the maximum hours permitted by the Coast Guard regulations; on June 25, he reported to the U. S. Coast Guard, Marine Safety Office in New Orleans that he believed his hours were excessive under the law.

On July 2, GARRIE told the TEXACO pumper he had notified the Coast Guard of the violations.

On July 3, 1986, GRAY transferred GARRIE from

his assignment at Horseshoe Bayou and replaced him with another skipper. GARRIE was placed on another assignment for a short period of time, but on or about July 21, 1986, he was permanently laid off. He was not recalled despite available assignments which were given to personnel with less seniority than GARRIE.

GARRIE filed suit against GRAY and TEXACO in the U.S. District Court for the Western District of Louisiana. The District Court dismissed the Complaint as to TEXACO, on grounds GARRIE's claim had been disallowed by the TEXACO bankruptcy court. After trial on the merits the remaining claims by GARRIE against GRAY were dismissed on the District Court's finding that GARRIE had not shown either retaliatory discharge under the general maritime law, or a violation of the whistleblower statute by GRAY. The Court found GARRIE's communication with the Coast Guard did not amount to the filing of a formal complaint and therefore was not protected activity. Judgment was entered on October 24, 1989, dismissing all claims by GARRIE against GRAY. TEXACO was dismissed prior to trial on a determination that any liability was discharged in bankruptcy.

On appeal the United States Court of Appeal for the Fifth Circuit affirmed, finding that GARRIE had not engaged in protected activity under the statute. The Fifth Circuit panel specifically held that a seaman who was discharged because he inquired of the Coast Guard as to whether a safety violation was still in effect, had no cause of action for wrongful discharge under 46 USCA 2114.

The Fifth Circuit further held that safety "whistleblowers" were not a protected class for purposes of 1985(3) of the Civil Rights Act.

Petitioner GARRIE respectfully suggests that the Court of Appeals in the first instance has decided an important federal question in a manner clearly inconsistent with the expressed intent of Congress. This Court should decide that the rights of seamen to be protected from retaliatory

charge coincide in scope with that afforded land based workers under OSHA; they may not be retaliated against for calling the Coast Guard to request information concerning safety regulations.

In the second instance, in deciding that safety whistleblowers are not members of a protected class for purposes of 1985(3) of the Civil Rights Act, the Fifth Circuit has rendered a decision in conflict with decisions of other federal courts of appeal, and of this Court on the same subject.

Relator respectfully avers the decision below is incorrect as a matter of law, and will negatively impact, or destroy, the right of seamen nationwide to contact the Coast Guard on matters of safety without fear of retaliation from their employers. For these reasons, review by this Court is particularly appropriate.

IX. ARGUMENT

A. This Court should grant a writ in this case to decide whether Congress intended maritime employees to have the same protection from retaliatory discharge as enjoyed by land-based workers under OSHA.

Both the trial court and the appellate court found these facts proven: (1) GARRIE was forced to work excessive hours in violation of the applicable federal safety regulation, (2) he believed in good faith that the practice was unsafe as well as illegal, (3) he telephoned the Coast Guard to inquire about the safety regulations, and (4) GARRIE was transferred from his vessel by GRAY at TEXACO's request because of his phone call to the Coast Guard, and (5) GARRIE was then laid off.

The district court found GARRIE did not engage in protected activity because he did not "file a complaint" with the Coast Guard. On appeal, Judge Smith agreed that GARRIE's communication with the Coast Guard did not satisfy the requirements of protected activity under 46 USCA 2114 because GARRIE merely made an inquiry of the Coast Guard as to whether a

particular statute was still in effect.

The opinion is based upon the following findings of fact,

> "Garrie, however, merely made an inquiry of the Coast Guard as to whether a particular statute was still in effect. He sought information, but he did not provide it. He did not file a complaint, nor did he reveal the name of his employer or the vessel upon which he was employed, information without which the Coast Guard could not investigate or prosecute a violation." (Appendix P. 35)

Those findings of fact are erroneous. Commander Spackman testified that GARRIE made a complaint about his excessive running time. His log of the telephone conversation was introduced in evidence, and from it Commander Spackman testified that GARRIE called on June 25, 1986 and "complained about working hours on a crew boat."

> GARRIE testified,
> "When I called him I told him my name and I said I am operating on a crew boat out of Horseshoe Bayou, Jim Gray, running for Texaco Oil Company, and I told him that I was having excessive hours of running time, which I believe to be against the Coast Guard rules and regulations or the law of that, so I wanted to inform him of that and make sure the laws were still the same about running over twelve hours a day as they was when I went to school." (Appendix P. 38)

More importantly, the appeals court erred as a matter of law in finding mere requests for safety information were not protected activity.

There is nothing in the literal text, or in the legislative history to demonstrate Congress intended to require

any formality of reporting, or the filing of a written or otherwise "formal" complaint as a prerequisite for the protection of seamen. Indeed, the word "complaint" does not appear in the statute.

The statute prohibits retaliation against a seaman who,

> "Has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred."

The legislative history of this section, enacted by 10 of P.L. 98-557 of 1984, states the only requirement for the Act's protection is the presence of a good faith belief that a safety violation has occurred.

> "The Committee intends the term seaman to be interpreted broadly, to include any individual engaged or employed in any capacity on board a vessel owned by a citizen of the United States. To receive relief, the seaman must act in good faith, believing that a violation of subtitle II of title 46 has occurred." U.S. Code, Cong. & Admin. News, 1984, P. 4842.

The legislative history also states the new section was to respond to the Fifth Circuit decision in *Donovan v. Texaco*, 720 F.2d 825 (5th Cir. 1983), which held 11(c) of OSHA, which protected workers from retaliation for reporting violations of that act, did not apply to seamen. Section 10 of the bill establishes a new legal remedy for seamen, to protect them against discriminatory action due to their reporting a violation of subtitle II to the Coast Guard. The amendment creates a private right of action similar to but not identical to that in OSHA 11(c).

In comparing the seaman statute with OSHA 11(c), it is important to note the latter does contain language indicating an intent to protect an employee who has "filed any complaint or instituted any proceeding" related to the Act, unlike 46 USCA 2114 which has no such restrictive language. The obvious conclusion is that if Congress had intended to require the filing of a formal complaint, or the institution of a proceeding under the Act in order to trigger the anti-retaliation protection of 2114, it could have written the section with that language, as it did in OSHA 11(c).

However, it is not necessary for the Court to make that deduction. The regulations under the more restrictive OSHA 11(c) clearly demonstrate the reach of even that statute is broad enough to encompass the type activity engaged in by GARRIE.

29 CFR 1977.9 defines a "complaint" much more broadly than did the Court in this case:

> "An example of a complaint made 'under' the Act would be an employee request for inspection pursuant to 8(f). However, this would not be the only type of complaint protected by 11(c). The range of complaints 'related to' the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application, which entails the full extent of the commerce power."

29 CFR 1977.15(b) states, "No particular form of complaint is required."

Finally, and perhaps most important 1977.12 specifies mere requests for information constitute protected activity:

> "Certain other rights exist by implication. For example, employees may request information from the OSHA; such requests would constitute the exercise of a right afforded by the Act."

The legislative history of 46 USCA 2114 clearly showed that Congress intended that section to provide seaman with protection similar to that afforded land based workers by the parallel OSHA anti-retaliation provision; therefore the cited regulations may be considered relevant.

GARRIE did in fact make a complaint; Commander Spackman's log of that telephone conversation says he "called to complain about his working hours." At the very least, GARRIE reported what he believed to be a violation of the safety regulations by his employer. The lower court's concern about the effect of a call to the Coast Guard which only seeks information, is only hypothetical. However, if that were the only purpose for GARRIE's call, he would still be protected from retaliation. The regulations show that the ability to call a federal agency to find out if unsafe practices are prohibited, without fear of discharge, is implicit in the protective scheme.

If the lower courts were correct in finding GARRIE's intent was only to seek information about whether his excessive hours violated the safety regulations, the corollary to that finding is inescapable; that request for information was protected activity under the statute and GARRIE could not be discriminated against or retaliated against for having made that communication.

The appellate court also erred by finding such communications with the Coast Guard did not "serve the purpose" of the seamen's protective statute; when the evidence showed GARRIE's call directly caused his employer to cease the unlawful practice.

District Judge Little cited the following testimony in his opinion:

> "Collins, on the other hand, testified that during the meeting in which Garrie's transfer was discussed, Guillotte told Collins and Gray that Garrie was no longer wanted at Horseshoe Bayou because of Garrie's communication with the Coast Guard. Collins

> also testified the boats at Horseshoe Bayou were re-manned after Garrie's transfer so the twelve hour Coast Guard regulation would no longer be violated." (Trial court opinion P. 4, 5) (Appendix P. 45)
>
> In spite of that evidence, the appellate court said:
>
> "In sum, Garrie's communication with the Coast Guard did not satisfy the requirements of 2114, nor did it serve the statute's purposes. He thus has no claim for wrongful discharge under 2114." (Appendix P. 35)

After GARRIE's communication with the Coast Guard, and after GARRIE made his employer know he had complained about his working hours to the Coast Guard, he was transferred, then laid off. But, at the same meeting in which the decision was made to transfer GARRIE, the boat schedules were changed so that no skipper ran more than twelve hours per day. Thus, if the test for protected activity is whether or not the communication "served the statute's purposes," then clearly that test was met in this case.

B. <u>This Court should grant a writ of certiorari in this case to decide whether a private conspiracy to deprive an individual of the federal protection of a "whistleblower" statute is actionable under 42 USCA 1985(3).</u>

GARRIE proved a violation of 42 USCA 1985(3) by the combination of GRAY and TEXACO. That section provides that if two or more persons conspire for the purpose of depriving any person of the equal protection of the laws, the party so injured or deprived has an action for the recovery of damages occasioned by such injury or deprivation. GRAY and TEXACO combined to deprive GARRIE of the protection of (a) 46 USCA 2114(a), which prohibits retaliation against a seaman for reporting safety violations

to the Coast Guard, and (b) his right to free speech under the First Amendment.

In order to prove a violation of 1985(3), the plaintiff must prove four elements: (1) a conspiracy, (2) for the purpose of depriving any person of the equal protection of the laws, (3) an act and furtherance of the conspiracy, (4) whereby a person is injured in his person or property or deprived of any right or privilege of a citizen of the United States. *Griffen v. Breckenridge*, 403 U.S. 88 102-103, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971).

1985 includes entirely private conspiracies to deprive persons of rights, privileges or amenities protected by the federal constitution or federal statutory law. *Great American Federal Savings & Loan Assoc. v. Novotny*, 442 U.S. 366 99 S.Ct. 2345 60 L.Ed.2d 957 (1979), Justice Stewart writing for the majority said:

> "1985(3) is a purely remedial statute providing a civil cause of action when some otherwise defined federal right is breached by a conspiracy in the manner defined by the section." 442 U.S. at 376, 99 S.Ct. at 2351.

In the instant case, there has been clearly shown a conspiracy by GRAY and TEXACO to deprive GARRIE of rights protected by federal statute 42 USCA 2114(a).

Further, there has been a showing of a conspiracy including the Defendant GRAY to deprive GARRIE of rights protected by the First Amendment of the United States Constitution.

Both the Fifth Circuit and the United States Supreme Court have ruled that 1985(3) prohibits private conspiracies to deprive individuals of rights protected by the First Amendment, with no showing of state involvement. *Griffen v. Breckenridge*, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971); *Scott v. Moore*, 680 F.2d 979 (5th Cir. 1982).

In *Lapin v. Tayler*, 475 F.Supp. 446 (D. Hawaii

1979), the court sustained the claim of an employee whistleblower as a valid action under 1985(3). It began with the premise that coverage of 1985(3) is triggered by a "governmental determination" that an identifiable group warranted special federal assistance in protecting their civil rights. Id. at 449. It went on to find that the "governmental determination" is one which can be made by the courts or by Congress, and the court concluded that 5 USCA 1201-1209 which gave certain protective rights to "whistleblowers" was the necessary governmental determination essential to creating a right of action under 1985(3).

While *Lapin* involved federal employees, and the Court specifically limited its holding to the facts, it stated that other employees could also meet the test for 1985(3) if they were protected by a specific federal statute similar to the whistleblower protection present in that case. Here, the identifiable group of persons (seamen) were in need of special federal assistance in protecting their civil rights, because the Fifth Circuit had held that OSHA anti-retaliation provisions did not apply to them. This is precisely the sort of "governmental determination" which the Lapin court identified as the premise for 1985(3) coverage.

In *United Brotherhood of Carpenters and Joiners v. Scott*, 103 S.Ct. 3352, 463 U.S. 825, 77 L.Ed.2d 1049 (1983), the Supreme Court suggested that an alleged conspiracy under 1985(3), to deprive any person of rights protected by the First Amendment, might require a showing that the state was somehow involved in or affected by the conspiracy.[1]

Nevertheless, if this Court should agree with the majority in Scott, and require some showing that the state or government was somehow involved in the deprivation of

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1 A substantial minority dissent by Blackmun, Brennan, Marshall & O'Connor disagreed, finding the Griffin decision did away with any requirement of state action under a First Amendment claim. Justice Blackmun wrote, "[1985(3)] was not intended to impose a state action or state involvement requirement on actions under the statute. Properly interpreted, 1985(3) prohibits private conspiracies designed to interfere with persons' equal enjoyment and exercise of their civil rights even if those conspiracies have no state involvement of any kind." Scott 103 S.Ct. at 3367.

First Amendment rights, Plaintiff respectfully submits a showing has been made by proof that the protected speech involved direct communications with the federal government; i.e., direc communication between GARRIE and the U.S. Coast Guard. Petitioner emphasizes, however, that any requirement for a showing of state involvement only applies to claims of infringement of First Amendment rights by the conspiracy.

There is absolutely no requirement for state involvement on the corollary claim that the conspiracy was intended to deprive GARRIE of rights protected by another specific federal statute. The proof that TEXACO and GRAY conspired to deprive GARRIE of the protection afforded him by 46 USCA 2114(a) is clearly the type of conspiracy by private individuals which was recognized to be within the scope of 1985 by the Supreme Court in *Griffin*. The Supreme Court has consistently held 1985 violations do not require state action where the underlying right is federally protected against deprivation by private actions, nor is it limited to claims of discrimination based on race. The only requirement is a showing of discrimination based on membership in a class protected by federal statute. Petitioner has shown he was discriminated against because of his membership in the class of person protected by 46 USC 2114(a); i.e., persons who make complaints of suspected safety violations to the Coast Guard. Therefore, Petitioner respectfully submits he proved a violation of 42 USCA 1985(3) so that punitive damages, and attorneys' fees under 42 USCA 1988, are applicable in this case.

X. CONCLUSION

Petitioner GARRIE respectfully suggests in this case the Court of Appeals in ruling that a seaman discharged in retaliation for calling the Coast Guard to request information on safety regulations, has decided an important federal question in a manner clearly inconsistent with the expressed intent of Congress. This Court should decide that

question, and take this opportunity to decide that the rights of seamen to be protected from retaliatory discharge coincide in scope with that afforded land based workers under OSHA; they may not be retaliated against for calling the Coast Guard to request information concerning safety regulations.

In the second instance, in deciding that safety whistleblowers are not members of a protected class for purposes of 1985(3) of the Civil Rights Act, the Fifth Circuit has rendered a decision in conflict with decisions of other federal courts of appeal, and of this Court on the same subject.

In both rulings, the Fifth Circuit has set precedent which will adversely affect the safety of maritime workers nationwide. The implications of the decision below will impact all seamen in their ability to contact the Coast Guard, on matters of safety, without fear of retaliation from their employers. The impact of the decision will be to destroy the ability of seamen to take reasonable measures to insure their safety and that of their crew.

Review by this Court of the decision below is necessary to preserve the intent of Congress in enacting 46 USCA 2114, to preserve rather than impair the safety of maritime workers, and their protection from retaliation for exercising a federally protected right.

Therefore, Relator HUBERT GARRIE respectfully prays that this petition for writ of certiorari be granted.

Respectfully submitted,
JEANSONNE AND BRINEY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has this day been deposited in the United States Mail, postage prepaid and properly addressed to Mr. William O. Bonin, Landry, Watkins & Bonin, Post Office Box 12040, New Iberia, Louisiana 70562-2040, (318) 364-7626.

Lafayette, Louisiana this twenty-first day of December, 1990.

s/Christopher L. Zaunbrecher
CHRISTOPHER L. ZAUNBRECHER

XI. APPENDIX

Hubert GARRIE, Plaintiff-Appellant,

v.

JAMES L. GRAY, INC., and Texaco, Inc.,
Defendants-Appellees.

No. 89-4815

United States Court of Appeals,
Fifth Circuit

Sept. 25, 1990.

Vessel pilot who was transferred to another vessel after inquiring of Coast Guard concerning a regulation regarding maximum working hours, and who was subsequently laid off, sued his employer and the lessee of the first vessel. Pilot alleged that defendants had discharged him for making report to the Coast Guard and conspired to deprive him of the equal protection of the laws. The United States District Court for the Western District of Louisiana, F. A. Little, Jr., J., entered judgment for defendants, and pilot appealed. The Court of appeals, Jerry E. Smith, Circuit Judge, held that: (1) claim against the lessee was properly discharged in bankruptcy; (2) pilot had no cause of action for wrongful discharge under general maritime law or under the statute forbidding retaliation against "whistleblower" seamen who report or are about to report safety violations to Coast Guard; and (3) pilot had no cause of action under 1985(3).

Affirmed.

1. Bankruptcy 3387

Even if discharged vessel pilot's claim that lessee of vessel was liable for wrongful discharge involved "willful and

malicious injury," claim was properly discharged in bankruptcy; although employee received actual notice that employer had moved to disallow his claim, he did not appear to contest that motion, nor did he appeal from bankruptcy court's order of dismissal. Bankr.Code, 11 U.S.C.A. 523(a)(6).

2. Bankruptcy 3355(1)

"Willful and malicious injury" exception to bankruptcy discharge, like all of exceptions to discharge, applied to individuals, not corporate, debtors. Bankr.Code, 11 U.S.C.A. 523(a)(6).

3. Master and Servant 30(6.35)
Seamen 12

Seaman had no cause of action for wrongful discharge under statute forbidding retaliation against "whistleblower" seamen who report or are about to report safety violations to Coast Guard; seaman merely made inquiry of Coast Guard as to whether particular statute was still in effect, and did not file complaint or reveal name of his employer or vessel upon which he was employed; information without which Coast Guard could not investigate or prosecute violation. 46 U.S.C.A. 2114.

4. Master and Servant 30(1.20)
Seamen 12

Under general maritime law, seaman had no personal right to refuse management directive with which he disagreed, even if it violated safety statute, and thus, seaman had no cause of action for wrongful discharge; his remedy was to contact Coast Guard and enlist its aid in correcting violation, and, even though seaman did contact Coast Guard, he did not make report thereto.

5. Conspiracy 7.5

Discharged seaman had no cause of action under 1985(3), as he showed no discriminatory animus, and did not demonstrate his membership in any protected class. 42

U.S.C.A. 1985(3).

Appeal from the United State District Court for the Western District of Louisiana.

Before THORNBERRY, JOHNSON, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

We are asked to create a new exception to the employment at will doctrine by expanding 46 U.S.C. 2114, which forbids retaliation against "whistleblower" seamen who report or are about to report safety violations to the Coast Guard, in order to protect those who merely make inquiries of the Coast Guard but do not report a violation or file a formal complaint. Because we conclude that such a result is foreclosed by the plain meaning and evident purpose of the statute, as well as by our recent decision in Feemster v. BJ-Titan Servs. Co./ Titan Servs., Inc., 873 F.2d 91 (5th Cir. 1989), we decline the invitation and affirm the judgment of the district court.

I.

Plaintiff Hubert Garrie was employed by defendant James L. Gray, Inc. ("Gray"), as a skipper on the MR. BILL, a vessel used to transport workers and equipment to various work sites. Defendant Texaco, Inc. ("Texaco"), leased the MR. BILL, complete with its crew, from Gray on a day-to-day basis.

On several occasions in June 1986, Garrie piloted the MR. BILL on both a "day run" and a "night run" within the same twenty-four-hour period and thus worked in excess of the twelve hours per day permitted by 46 U.S.C. 8104(h).[1] Believing this practice to be unsafe as well as illegal, Garrie on June 23 informed Texaco representative Stuart Hidalgo that he would no longer work more than twelve hours per day

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1 Section 8104(h) provides, "On a ... [towing vessel that is at least 26 feet in length], an individual licensed to operate a towing vessel may not work more than 12 hours in a consecutive 24-hour period except in an emergency."

and that if Texaco wished to make both day and night runs with the MR. BILL, the vessel would require another captain and a full crew. Garrie did not complain about his working hours to anyone at Gray.

On June 25, Garrie telephoned Commander A. E. Spackman of the Coast Guard. After identifying himself, but not his employer, Garrie inquired whether "the regulation regarding maximum working hours" was still in effect. Spackman advised Garrie that it was, but did not refer the matter to an investigator, since Garrie had stated that he did not wish to file a formal complaint. On July 1, Garrie informed Hidalgo that the Coast Guard had confirmed his understanding of the applicable maximum working hours and that it was still his intention to refuse to work more than twelve hours per day.

Two days later, Garrie was reassigned to the CAPT. JIM, another crewboat owned by Gray and leased by Texaco.[2] His transfer had been requested by Jerry Lambert, a Texaco production supervisor. Lambert felt that day and night runs on the MR. BILL were necessary in order to service a "problematic well that needed attention" and complained to Garrie's supervisors that if Garrie refused to make both runs, they should find another captain who would. Lambert did not ask Gray to fire Garrie; rather, he requested that Garrie be reassigned to a vessel other than the MR. BILL.

For the next few weeks, Garrie piloted the CAPT. JIM on the night run out of Ivanhoe. On July 21, however, Texaco discontinued the night run of the CAPT. JIM.[3] As a result, the CAPT. JIM required only one skipper and Garrie, who had less seniority than the other captain assigned to the vessel, was laid off. Garrie sought another job with Gray, but

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2 Garrie did not protest the transfer, as the CAPT. JIM operated out of Ivanhoe, Louisiana, which was located closer to Garrie's home than was the MR. BILL's port.

3 Garrie does not allege that Texaco's decision to discontinue the night run of the CAPT. JIM had anything to do with his complaints regarding working hours or his communications with the Coast Guard.

his old position on the MR. BILL was unavailable,[4] and other available positions proved unsuitable: Garrie could not work offshore, because he suffered from seasickness and refused to work on a certain vessel because of personal problems involving another employee and Garrie's former wife. Garrie has not worked for Gray since his layoff in July 1986.

In February 1987, Garrie filed suit in federal district court against Gray and Texaco, asserting admiralty and maritime jurisdiction and also, inconsistently, demanding a jury trial.[5] He claimed that the defendants had discharged him for making a report to the Coast Guard, in violation of 46 U.S.C. 2114[6] and general maritime law, and had conspired to deprive him of the equal protection of the laws, in violation of 42 U.S.C. 1985(3).

In October 1989, the case proceeded to a bench trial against Gray alone, Texaco previously having been dismissed on the basis of its discharge in bankruptcy. At the close of all the evidence, the district court entered judgment for Gray, reasoning that Garrie had failed to establish an exception to the employment at will doctrine in his

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4 Apparently, Texaco insisted that Garrie not be reassigned to the MR. BILL.

5 The district court struck Garrie's demand for a jury trial, correctly concluding that the seventh amendment guarantee of trial by jury does not apply in admiralty actions (see, e.g., T.N.T. Marine Serv. v. Weaver Shipyards, 702 F.2d 585, 587 (5th Cir.), cert. denied, 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983)) and that 46 U.S.C. 2114, upon which Garrie based his right to relief, was a statute dealing with admiralty and maritime matters.

6 That statute provides,

> Protection of seaman against discrimination
>
> (a) An owner, charterer, managing operator, agent, master, or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred.
>
> (b) A seaman discharged or otherwise discriminated against in violation of this section may bring an action in an appropriate district court of the United States. In that action, the court may order any appropriate relief, including —
>
> (1) restraining violations of this section; and
>
> (2) reinstatement to the seaman's former position with back

case.[7] Under Feemster, Garrie could not assert a wrongful discharge claim on the ground that he was fired for refusing to work in excess of the twelve-hour limit imposed by section 8104(h), and, because Garrie had not reported a safety violation to the Coast Guard, or led anyone to believe that he planned to do so, he could not claim the narrow protections of section 2114. Finally, the district court denied Garrie's section 1985 conspiracy claim, explaining that "[t]itle VII of the Civil Rights Act of 1964 is irrelevant to this case, and thus Garrie's claim under . . . [this statute] is without merit."

On appeal, Garrie asserts various challenges to the district court's pre- and post-trial rulings. He first contends that his claims against Texaco were not discharged in the corporation's bankruptcy proceedings, as they involved "willful and malicious injury" within the meaning of 11 U.S.C. 523(a)(6).[8] In addition, Garrie maintains (1) that the district court clearly erred in finding that he did not report a violation to the Coast Guard; (2) that he has a wrongful discharge claim under section 2114 or general maritime law even if he did not make such a report; and (3) that the evidence adduced at trial provided that Texaco and Gray had conspired to deprive Garrie of the equal protection of the laws in violation of Section 1985.[9]

II.

[1] Before reaching the central question presented in

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7 Generally, "[i]n the absence of a contractual provision specifying a definite term or voyage during which a seaman will be employed, the seaman's employment is 'terminable at will by either party.'" Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057, 1060 (5th Cir. Unit A Aug. 1981) (quoting Findley v. Red Top Super Markets, Inc., 188 F.2d 834, 837 n. 1 (5th Cir.), cert. denied, 340 U.S. 870, 72 S.Ct. 112, 96 L.Ed. 654 (1951)). In Smith, 653 F.2d at 1061-63, we recognized a narrow exception to the employment at will doctrine, holding that a seaman who had been fired for bringing a personal injury suit under the Jones Act could assert a retaliatory discharge claim against his employer.

8 Section 523(a)(6) provides in pertinent part that a discharge in bankruptcy "does not discharge an individual debtor from any debt ... for willful and malicious injury by the debtor to another entity or to the property of another entity."

9 Garrie also protests the district court's decision to strike his demand for a jury trial. Because we have addressed that argument, see supra note 5, we discuss it no further.

this appeal, we must first decide whether Texaco properly was dismissed on the basis of its discharge in bankruptcy. As is widely known, Texaco and two affiliated entities initiated voluntary Chapter 11 proceedings in the bankruptcy court for the Southern District of New York in April 1987. Approximately one year later, the bankruptcy court confirmed a plan of reorganization and granted the reorganized debtors a discharge of all debts.

Garrie, through his attorney, filed a timely proof of claim in that bankruptcy proceeding. There, he asserted that

> . . . debtor, as the charterer or managing operator of a vessel in navigation, discharged and otherwise discriminated against claimant because claimant reported to the U.S. Coast Guard a violation of federal safety regulations by debtor, which discharge and discrimination were prohibited by 46 U.S.C. 2114.

On June 1, 1988, Garrie's attorney was notified that Texaco had moved for disallowance of the claim "on the ground that the books and records of the reorganized debtor do not reflect any amount due and owing" and that he could appear and contest that motion at a specified time and place. Garrie took no action in response to this notice, and on August 24 the bankruptcy court issued an order disallowing numerous claims Garrie's among them. Garrie did not appeal that order.

Although he does not dispute any of these facts, Garrie contends that his claims against Texaco were not dischargeable in bankruptcy, because they involved "willful and malicious injury" within the meaning of section 523(a)(6). This argument fails for two independently sufficient reasons. First, even were we to conclude that retaliatory discharge constitutes "willful and malicious injury" (a proposition for which Garrie cites no authority), Garrie nonetheless cannot rely upon that exemption, since he did not assert it in the bankruptcy court.

As Texaco points out, the "willful and malicious injury" exemption is not automatic; instead, it is incumbent upon the creditor to assert the exemption and object to the discharge.[10] Garrie, however, took no action in Texaco's bankruptcy proceedings beyond filing a proof of claim. Although he received actual notice that Texaco had moved to disallow his claim, he did not appear to contest that motion, nor did he appeal from the bankruptcy court's order of dismissal. Accordingly, Garrie's claim, even if it does involve "willful and malicious injury," was properly discharged in bankruptcy.

[2] Moreover, the "willful and malicious injury" exception to discharge, like all of the exceptions to discharge found in section 523(a), applies only to individual, not corporate, debtors. As explained in Yamaha Motor Corp., U.S.A. v. Shadco, Inc., 7652 F.2d 668, 670 (8th Cir. 1985),

> ... both the language of... [section 523(a)] and the case law interpreting the statute militate against applying the exemption to corporate debtors. See In re Kuempel Co., 14 B.R. 324, 325-27 (Bankr. S.D. Ohio 1981). See also In re Lucas, 21 B.R. 585 (Bankr. W.D. Pa. 1982). Congress clearly did not intend the term 'corporate debtor' to be used interchangeably with the term 'individual debtor,' as such a construction would 'render meaningless employment by Congress of the term "individual"' (quoting Kuempel, 14 B.R. at 325).

Texaco is, of course, a corporate debtor; accordingly, Garrie's claims against it, even if resulting from "willful and mali-

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10 11 U.S.C. 523(c) provides in pertinent part that

> ... the debtor shall be discharged from a debt specified in paragraph ... (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph ... (6) ... of subsection (a) of this section. [Emphasis added.]

cious injury," were properly discharged in bankruptcy. The district court did not err in dismissing Texaco from this case.

III.

A.

We now turn to the central question presented in this appeal — namely, whether Garrie has stated a claim for wrongful discharge under section 2114 or general maritime law. At the outset, we note that the district court was not clearly erroneous in finding that Garrie did not report, or lead anyone to believe that he planned to report, a violation of section 8104(h); indeed, that finding is amply supported by the record.

Garrie testified at trial that he "called the Coast Guard in order to get information about running times" and to verify his understanding of the applicable rules before discussing the matter with Texaco. He further acknowledged that he did not ask the Coast Guard to take any action against Texaco or Gray. Spackman testified that while he had no independent recollection of his conversation with Garrie, his contemporaneous notes indicates that Garrie did not reveal the name of his employer and did not wish to file a formal complaint. Spackman's customary practice was to refer complaints to an investigating officer; however, he made no such referral in Garrie's case.

Moreover, the record establishes that Garrie did not lead anyone to believe that he planned to make a report. After Garrie informed Texaco that he had made inquiries of the Coast Guard to confirm his understanding of maximum working hours and accordingly, would no longer work more than twelve hours per day, he was reassigned to the CAPT. JIM. He accepted the new assignment without complaint, as it enabled him to work closer to home and did not require him to work more than twelve hours per day. At no time following his transfer did Garrie indicate that he planned any further communication with the Coast Guard.

B.

[3] Section 2114 is narrowly tailored to protect only

the seaman who "in good faith has reported or is about to report to the Coast Guard . . . a violation of this subtitle, or a regulation issued under this subtitle. . . ." Its evident purpose is to promote compliance with maritime statutes and regulations by encouraging seamen (who are in the best position to observe violations) to make reports to the Coast Guard without fear of termination or other reprisals.

Garrie, however, merely made an inquiry of the Coast Guard as to whether a particular statue was still in effect. He sought information, but did not provide it. He did not file a complaint, nor did he reveal the name of his employer or the vessel upon which he was employed — information without which the Coast Guard could not investigate or prosecute a violation. In sum, Garrie's communication with the Coast Guard did not satisfy the requirements of section 2114, nor did it serve the statute's purposes. He thus has no claim for wrongful discharge under section 2114.

[4] Moreover, circuit precedent forecloses Garrie's alternative argument that we should recognize such a claim under general maritime law. In Feemster, a seaman who was discharged for refusing to work more than the twelve hours per day permitted by section 8104(h) brought a wrongful discharge claim against his employer. He argued that, under our decision in Smith, he could not be terminated for refusing to commit an unlawful act. See Smith, 653 F.2d at 1061 n. 9 (citing authorities recognizing exceptions to employment at will doctrine). We concluded, however, that there existed no general cause of action for wrongful discharge under maritime law, Feemster, 873 F.2d at 93 and that the plaintiff "had no personal right to refuse a management directive with which he disagreed, even if it violated a safety statute." Id. Instead, his remedy was to contact the Coast Guard and enlist its aid in correcting the violation.[11]

Garrie contends that his case is distinguishable from Feemster in that he, unlike the plaintiff there, did speak with

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11 We did not discuss 2114 in Feemster, presumably because the plaintiff, who had not communicated in any way with the Coast Guard, did not raise it.

the Coast Guard. However, as we noted above, Garrie did not make a report thereto; he merely contacted the Coast Guard to verify his understanding of maritime law and then used that knowledge "to refuse a management directive with which he disagreed." Under Feemster, Garrie had no personal right to do so, and no ground for relief under general maritime law if he was fired for that reason. The district court thus was correct in concluding that Garrie failed to establish an exception to the employment at will doctrine and consequently had no claim for wrongful discharge.

IV.

[5] Finally, Garrie contends that even if he has no claim for wrongful discharge, he nevertheless has demonstrated that Gray and Texaco conspired to deprive him of the equal protection of the laws in violation of section 1985(3).[12] However, we agree with the district court that that statute has no application to the facts of this case. As the Supreme Court explained in Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971), there can be no section 1985 violation absent "some racial or otherwise class-based, invidiously discriminatory animus in the conspirators' action." Garrie has shown no such discriminatory animus, nor has he demonstrated his membership in any protected class.[13] Accordingly, he cannot state a claim under section 1985(3).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

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12 Garrie argues that Gray and Texaco conspired to deprive him of two federally protected rights — his right to report a violation to the Coast Guard pursuant to 2114 and his first amendment right to communicate with the Coast Guard.

13 Garrie cites Lapin v. Taylor, 475 F.Supp. 446, 449 (D.Hawaii, 1979), for the proposition that "whistleblowers" are a protected class for purposes of 1985. The coverage of Lapin, however, was restricted to federal employees. Id. at 450 n. 11. Moreover, that decision has been explicitly rejected in two more recent decisions from other courts. See Buschi v. Kirvens, 775 F.2d 1240, 1258-59 (4th cir. 1985); Pope v. bond, 641 F.Supp. 489, 498-99 (D.D.C. 1986).

FOR THE FIFTH CIRCUIT

No. 89-4815

HUBERT GARRIE,

Plaintiff-Appellant,

versus

JAMES L. GRAY, INC.,
and TEXACO, INC.

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING

(October 24, 1990)

Before THORNBERRY, JOHNSON and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

s/(illegible)
United States Circuit Judge

period of time?

A. Yes, sir, I was off until the next week.

Q. All right. Now, during that time that you were off did you have any conversation with any other person about your hours of work?

A. Yes, sir, I called the Coast Guard in New Orleans, which is Commander Spackman that I talked to.

Q. Do you know the precise date that you called him?

A. I had wrote it down on a note in my book and I looked at it and it was on the 25th.

Q. All right. It was during the period of time that you were off?

A. Yes, sir.

Q. All right. You spoke with Commander Spackman with the Coast Guard in New Orleans, correct?

A. Yes, sir, that's correct.

Q. And what did you tell Commander Spackman?

A. When I called him I told him my name and I said I'm operating a crewboat out of Horseshoe Bayou, Jim Gray, running for Texaco Oil Company, and I told him that I was having excessive hours of running time, which I believe to be against the Coast Guard rules and regulations or the law of that, so I wanted to inform him of that and also check and make sure that the laws were still the same about running over twelve hours a day as

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they was when I went to school because when I went to school for my license, it was in 1965, and I wanted to ask him to make sure that I was - would be doing the right thing by going over there and talking to the people for them to go on a twelve hour basis a day, which is for what I did, I went and I talked to Clyde, which was the production foreman at the time.

MR. BONIN: Your Honor, I object to that, that is not responsive to the question, which was what did he tell the Coast Guard.

Q. After you had - after you said what you did to Commander Spackman, what, if anything, did he tell you?

MR. BONIN: Your Honor, I object to that as hearsay.

THE COURT: I would think it would be.

MR. ZAUNBRECHER: Withdraw the question.

Q. Did you have any other conversations with Commander Spackman other than that one telephone call?

A. No, sir, only that one time.

Q. All right. When did you return to work? You can refer to your logs.

A. I returned to work Tuesday, July the 1st. Let's see, that's —

Q. Tuesday, July 1st, 1986?

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the subsequent layoff of Mr. Garrie?

A. That is correct.

Q. All right. Please describe for me what occurred in June of 1986 that you know of that prompted James L. Gray, Inc. to transfer Mr. Garrie out of Horseshoe Bayou?

A. Mr. Larry Guillotte, boat foreman for Texaco, had a meeting with Mr. Gray and myself and at the meeting told us that the field foreman at Horseshoe Bayou no longer wanted Hubert Garrie at that site.

Q. Did he tell you why the field foreman no longer wanted Mr Garrie at that site?

A. He told us that Hubert Garrie either called the Coast Guard and complained about running too much or was going to call the Coast Guard and complain that he was running too much.

Q. Mr. Guillotte told that to you directly?

A. That is correct.

Q. All right. Did you understand that to be the reason why Mr. Garrie was no longer wanted at Horseshoe Bayou?

A. As far as I can say, yes.

Q. Was there any other reason that you knew of why Mr. Garrie was being transferred; by that, I mean anything in connection with his work performance?

A. No, sir.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

HUBERT GARRIE

CIVIL ACTION NO. 87-0420

-vs-

SECTION "O" (JUDGE LITTLE)

JAMES L. GRAY, INC.,
et al.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff, Hubert Garrie ("Garrie"), was employed by the defendant, James L. Gray, Inc., as the master of a vessel used to transport the crewmen and equipment of Texaco, Inc. Garrie asserts he was required to work excessive hours in violation of 46 U.S.C. 8104(b), which regulates the maximum working hours of individuals on oceangoing or coastwise vessels, and alleges Texaco had James L. Gray, Inc. fire him because he complained to the Coast Guard of this violation. Garrie brought suit against James L. Gray, Inc. and Texaco under 46 U.S.C. 2114 which provides seamen whistleblowers with a cause of action for wrongful discharge. This court dismissed Garrie's claims against Texaco on 20 June 1989. The one-day bench trial of this matter was held on 19 July 1989. The following represents the court's findings of fact and conclusions of law, reached after a thorough review of the testimony and evidence as well as the pretrial and post-trial memoranda of each party.

FACTUAL BACKGROUND

In May, June and July of 1986, Garrie was employed

as a licensed crew boat captain by James L. Gray, Inc. and was assigned to the MR. BILL, a vessel leased by Texaco to transport personnel and equipment. Garrie generally transported a Texaco pumper out of Horseshoe Bayou to Bell Island and back. In June of 1986 through July of 1986, Garrie did not work scheduled hours; rather, he would make a day or night run, whichever was needed. Garrie would leave for the day run at 6:00 A.M. and return at around 3:00 P.M. Often after his day run, Garrie would then make night runs with another pumper to Rabbit Island, stand by overnight until approximately 5:30 and then return to Horseshoe Bayou for his regular day run to Bell Island. The log book for the MR. BILL indicated that as a result of this schedule Garrie worked more than twelve hours per day on several occasions in June of 1986.

On 23 June 1986, Garrie spoke with his immediate supervisor, a Texaco pumper named Stuart Hidalgo, stating he believed the excess hours violated Coast Guard regulations. Garrie told Hidalgo that in order to run more than twelve hours per day the vessel would need two captains and a full crew. Believing the excess hours unsafe, Garrie stated he would not run more than the twelve hours allowed under Coast Guard regulations.

Garrie did not work from 23 June 1986 until 1 July 1986. On 25 June 1986, Garrie contacted Commander A. E. Spackman of the United States Coast Guard. After identifying himself, but not his employer, Garrie asked if the regulation regarding maximum working hours was still in effect. Commander Spackman advised that it was but did not refer the matter to an investigating officer because Garrie did not want to file a complaint. Before talking with Commander Spackman, Garrie did not complain about his hours to anyone at James L. Gray, Inc., only to Hidalgo, the Texaco pumper. Garrie's conversation with Commander Spackman was his only communication with the Coast Guard regarding excessive working hours.

When Garrie returned to work on 1 July 1986, he informed Hidalgo that he had spoken with the Coast Guard

about the excessive hours and would not run more than twelve hours per day. Garrie testified that on 2 July 1986 he talked with Clyde Delatte, Jerry Lambert and Emette Sellars, all Texaco production foremen, to inquire whether new schedules had been made. Garrie was told to continue to run the day shift. On 3 July 1986, Johnny Collins, the personnel manager for James L. Gray, Inc., informed Garrie he should report to the Port of Iberia where he would receive further orders.

Once in Iberia, Collins offered Garrie another job as the master of the CAPT. JIM working out of Ivanhoe. Garrie was told the CAPT. JIM would run twenty-four hours a day and he would be one of three captains, each of whom would be running twelve-hour shifts. Although Garrie testified he was not given the opportunity to remain at Horseshoe Bayou, he accepted the job out of Ivanhoe without complaining to anyone at James L. Gray, Inc., one reason being the Ivanhoe location was closer to his home. From 7 July 1986 through 13 July 1986, Garrie made the night run on the CAPT. JIM working twelve hours per day.

The decision to transfer Garrie was made by Jerry Lambert, the Texaco production supervisor, whose jurisdiction included Horseshoe Bayou and the vessel MR. BILL. Lambert testified Garrie was asked to make day and night runs because of a problematic well that needed attention. When Garrie complained about the excessive hours, Lambert called Larry Guillotte, the Texaco boat foreman who hired and fired boats in the district, and stated if Garrie would not do the job, then find someone who would. Guillotte then met with Johnny Collins and Jim Gray, president of James L. Gray, Inc., and informed them Texaco wanted Garrie transferred out of Horseshoe Bayou. The testimony regarding the reasons behind Garrie's transfer is somewhat contradictory. Guillotte testified he learned that Garrie had called the Coast Guard after meeting with Lambert and was aware of this communication during the meeting with Collins and Gray. Guillotte denied, however, the transfer request was made because of Garrie's call to the Coast Guard.

Collins, on the other hand, testified that during the meeting in which Garrie's transfer was discussed, Guillotte told Collins and Gray that Garrie was no longer wanted at Horseshoe Bayou because of Garrie's communication with the Coast Guard. Collins also testified the boats at Horseshoe Bayou were remanned after Garrie's transfer so the twelve-hour Coast Guard regulation would no longer be violated.

On 21 July 1986, Collins called Garrie to inform him Texaco had discontinued the night run of the CAPT. JIM and had contracted with another boat to make the night run out of Ivanhoe. Since Garrie was the last person to be hired on the CAPT. JIM, the other captains had more seniority and therefore Garrie's employment would be suspended. There was no charge that the lay-off was connected to Garrie's conversation with the Coast Guard, only that Texaco changed the schedule and had hired another company to make the night run out of Ivanhoe. When asked about his old job at Horseshoe Bayou, Collins told Garrie it was unavailable due to Texaco's request. According to James Gray, other positions with the company were unacceptable: Garrie could not work offshore because of seasickness, nor was he willing to work on another James L. Gray, Inc. vessel because of personal problems involving another employee and Garrie's former spouse. Garrie has not worked for James L. Gray, Inc. since his termination.

CONCLUSIONS OF LAW

The seminal Fifth Circuit case involving a retaliatory discharge involving seamen is Smith v. Atlas Offshore Boast Service, Inc., 653 F.2d 1057 (5th Cir. 1981), in which the court implied a cause of action when a seaman was fired for maintaining a Jones Act personal injury claim against his employer. Although it acknowledged the seaman was employed at will and that employment-at-will may be terminated for any or no reason, the court referred to exceptions to the doctrine recognized when the discharge offends public policy. In doing so, Judge Rubin concluded that a seaman has a cause of action if a substantial motivating factor in his

discharge is the filing of a Jones Act action against his employer.

In a recent case, the Fifth Circuit applied the Smith rationale to a case similar to the one at bar. In Feemster v. BJ-Titan Services Co./Titan Services, Inc., 873 F.2d 91 (5th Cir., 1989), the plaintiff was instructed to push a barge on a journey which would have taken eighteen hours. Feemster refused to make the trip on the grounds it was too long to be navigated safely by one person and would violate a federal law that generally restricts vessel operation to twelve hours in a twenty-four hour period. When Feemster continued to refuse to accept the assignment, BJ-Titan management discharged him.

Before addressing Feemster's claim, the court examined the public policy exceptions to the employment-at-will doctrine which was the basis of the Smith rationale. The court noted that "[t]hese exceptions can apply when an employee is discharged for (1) refusal to commit an unlawful act, (2) performance of an important public obligation, or (3) exercise of a statutory right of privilege." Id. at 93 (citations omitted). Although Smith explicitly relied on the third public policy exception to find a cause of action under general maritime law, Feemster sought to apply the first exception. Feemster argued for recognition of a cause of action for refusing to perform a job assignment that would have violated a federal statute, 47 U.S.C. 8104(h), which provides:

> On a vessel to which [this section] applies, an individual licensed to operate a towing vessel may not work for more than 12 hours in a consecutive 24-hour period except in an emergency.

The court concluded, however, that an exception to the employment-at-will doctrine was not warranted and Smith should not be broadened to apply to Feemster's situation.

In denying Feemster a cause of action, the court noted the public policy considerations implicated in Smith were not

present in Feemster's situation. The plaintiff in Smith had a statutory right to bring a personal injury action against his employer, and his discharge was a clear case of retaliation since the employer punished Smith for doing exactly what the law permitted him to do. Feemster even conceded that the statute upon which he relied provided him with no personal right to refuse a management directive with which he disagreed, even if it violated a safety statute. Additionally, since Congress had recently reorganized, revised and amended Title 46 in 1983, the court found it significant "that Congress provided no private right of action for retaliatory discharge." Id. As the court stated, "[t]he general purpose of this legislation is to promote maritime safety, but not with employees acting as private enforcers and as private attorneys general; the agent of enforcement is the Coast Guard." Id.

Garrie's action for wrongful discharge is analogous to that of Feemster's. Garrie claims the excessive hours which he was required to work violated 46 U.S.C. 8104(b), which provides:

> On an oceangoing or coastwise vessel of not more than 100 gross tons (except a fishing, fish processing, or fish tender vessel), a licensed individual may not be required to work more than 9 of 24 hours when in port, including the date of arrival, or more than 12 of 24 hours at sea, except in an emergency when life or property are endangered.

Since Feemster dealt with 46 U.S.C. 8104, the statute upon which Garrie relies, the Feemster court's reasoning is applicable and Garrie's claim for wrongful discharge must therefore fail.

Garrie attempts to rely on another aspect of Feemster which purportedly provides him with a cause of action. At one juncture, the court states:

> [O]ur denial of a legal cause of action to a seaman here does not deny an individual seaman a voice in the enforcement scheme and the right to claim the benefits of the statute. An employee can complain of safety violations to the Coast Guard and enlist its aid to prevent violations. If Feemster had filed such a complaint and had been fired for doing so, he certainly would have a stronger argument that his discharge contravened public policy. The reaction of the employer in that situation would have been more akin to true retaliation for exercising a given right as occurred in Smith.

Id. at 93-94. As with other aspects of Feemster, the language is applicable to this case as well. Garrie contends he was fired because he reported to the Coast Guard. By his own admission, however, Garrie did not file a complaint; he merely called the Coast Guard to ascertain whether the applicable regulation was still in effect. Commander Spackman also testified that Garrie did not wish to report a violation. Had Garrie wanted to file a complaint, Commander Spackman would have referred the matter to an investigating officer. Since Garrie never filed a complaint, nor notified the Coast Guard a safety violation had occurred, his reliance on this aspect of Feemster is misplaced.

Garrie also contends he should be afforded relief under 46 U.S.C. 2114, which provides:

> An owner, charterer, managing operator, agent, master, or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle

. . . or a regulation issued under this subtitle
. . . has occurred.

As stated above, Garrie communicated with the Coast Guard only once to inquire about the status of a particular regulation. Garrie never filed a complaint or reported any violation, nor is there any evidence that he was about to report a violation once his transfer was effected. He therefore cannot avail himself on this provision.

Finally, Garrie also argues that James L. Gray, Inc. violated other federal statutes, namely 42 U.S.C. 1985 and 1988 Title VII of the Civil Rights Act of 1964 is irrelevant to this case, and thus Garrie's claims under these statutes are without merit.

CONCLUSION

After careful consideration of the evidence and controlling law in this case, and for the foregoing reasons, the court rules as follows. The court finds in favor of the defendant, James L. Gray, Inc., on all claims brought for wrongful discharge under 46 U.S.C. 8104(b) and 2114(a) and therefore DISMISSES these claims. The court also finds in favor of the defendant, James L. Gray, Inc., on all claims arising under Title VII and hereby DISMISSES all such claims.

Defendant shall prepare and submit a judgment to this court within fifteen (15) days.

Alexandria, Louisiana.
11 October 1989.

s/F. A. Little, Jr.
F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

HUBERT GARRIE	:	CIVIL ACTION NO. 87-0420 "O"
VERSUS	:	JUDGE LITTLE
JAMES L. GRAY, INC., ET AL	:	MAGISTRATE

JUDGMENT

This matter was tried before the Court on July 19, 1989. In accordance with the Findings of Fact and Conclusions of Law dated October 11, 1989:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, James L. Gray, Inc., and against plaintiff, Hubert Garrie, dismissing all claims of Hubert Garrie against James L. Gray, Inc. at the cost of plaintiff.

Alexandria, Louisiana.
23 October 1989.

s/F. A. Little, Jr.
F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE